



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 31, 1996

Mr. Joel V. Roberts  
City Attorney  
City of Odessa  
P.O. Box 4398  
Odessa, Texas 79760

OR96-1341

Dear Mr. Roberts:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act. Your request was assigned ID# 40681.

The City of Odessa (the "city") received a written request for information relating to a specified business and to ordinances regulating sexually oriented businesses. You assert that certain information that may be responsive to the request is excepted from disclosure by sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You have provided for our review a copy of the information at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision Nos. 638 (1996) at 2, 551 (1990) at 4.

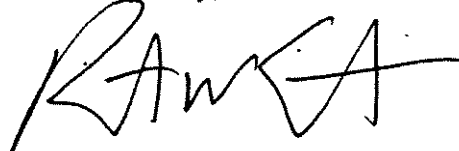
Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 452 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. *Id.*; see also Open Records Decision Nos. 555 (1990), 346 (1982).

In the case at hand, the city indicates that a dispute has arisen between the city and an individual who owns an adult entertainment business. The city states that the business owner has hired an attorney who has threatened litigation if the dispute is not resolved. Additionally, the request for information in this instance was made by an attorney who represents the business owner. Based on this evidence, this office finds that litigation is reasonably anticipated and that the requested information is related to the anticipated litigation. Therefore, the city may withhold the requested information under section 552.103.<sup>1</sup>

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue. Section 552.103 is intended to protect the litigation interests of a governmental body by forcing parties that are or may be in litigation with a governmental body to obtain information relating to the litigation through the discovery process, if at all. Open Records Decision No. 551 (1990) at 3. The litigation exception was intended to prevent the use of the Open Records Act as a method to avoid discovery rules. *Id.* at 4. Once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and that information may not be withheld under this exception. *Id.*; see also Open Records Decision Nos. 454 (1986), 349 (1982), 320 (1982), 288 (1981). If the opposing party in this potential litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'RWS', followed by a stylized flourish.

Robert W. Schmidt  
Assistant Attorney General  
Open Records Division

RWS/rho

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<sup>1</sup>Because we find that the city may withhold the requested information under section 552.103 of the Government Code, we do not address the other arguments made by the city that the information is excepted from disclosure.

Ref.: ID# 40681

Enclosures: Submitted documents

cc: Mr. Patrick Wiseman  
Wiseman, Durst, Tuddenham & Owen  
1004 West Avenue  
Austin, Texas 78701-2019  
(w/o enclosures)